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OTHER AUTHORITIES CITED:

Remington on Bankruptcy, Paragraphs 2583, 2602-2604.

IN THE

Supreme Court of the United States

In the Matter of
DELTA BREWING COMPANY,
a Corporation,

Debtor.

NORTHWESTERN BREWERS SUPPLY COMPANY and STURDY-BILT EQUIPMENT CORPORATION,
Creditors and Appellants,

vs.

WILLIAM J. SCHMIT,

Trustee and Appellee.

BRIEF IN OPPOSITION TO WRIT OF CERTIORARI

SUPPLEMENTAL STATEMENT OF MATTER INVOLVED

(Figures in parentheses refer to pages of the printed record, except as the context clearly indicates otherwise.)

Petitioner's statement needs to be supplemented. The bids for all of the unencumbered property in the estate in parcel amounted to $2,925.00. See Parcels 6, 8, 19, and 20 (R. 45, 46, 48, 49). All of the property in the estate offered for sale subject to liens and encumbrances brought a bid of only $3,550.00. See Parcel 23 (R. 49). The Referee sold the property free and clear of liens and encumbrances, because he had to do that in order to

secure sufficient money to pay administration expenses properly chargeable to the encumbered property (R. 92, 94, 107, 108). The administration expenses incurred under Chapter 10 of the Chandler Act are about as follows (R. 93):

Unpaid reorganization trustee's notes	$5,000.00
Unpaid reorganization trustee's expenses	1,578.66
Fees of reorganization trustee	2,000.00
Expenses of attorneys for reorganization trustee	229.02
Fees of reorganization Referee in Bankruptcy	532.00
Expenses of attorney for reorganization trustee	350.00
Services of attorneys for the bankrupt in reorganization proceedings—228¾ hours	750.00
Services of attorney for the reorganization trustee	750.00
Total expenses incurred under reorganization proceedings	$11,189.68

The last two items were not specified in terms of money in the record (R. 93), but the items are mentioned, and the figures we have used are our estimate of what might be allowed by the Referee.

In addition to these items there must be considered the expenses incurred in the bankruptcy proceedings pertaining to the care and sale of the property which we estimate will be not less than $3,000.00. The petitioner shows a total estimated unpaid administration expense of $20,693.28 (Petition, page 3). Our estimate is under this figure but it obviously could not be paid with only $3,550.00,—the highest bid for all of the property subject to liens and encumbrances. At private sale the trustee sold the unencumbered property for $3,800.00 (R. 69, 70).

JURISDICTION:

We deny that the Court does have jurisdiction because there is no conflict in the Federal decisions touching upon the question involved.

QUESTIONS PRESENTED:

We submit that the questions stated by the petitioner are not in point, and that the real question involved is as follows:

> "After a Court has authorized the expenditure of money for the purpose of preserving the value of encumbered property in regular proceedings under Chapter 10 of the Chandler Act, after due notice to, and without objection from a secured creditor, can that creditor prevent the Court from selling that property for the purpose of paying the proper proportion of money spent by the Court upon that property for its preservation."

REASONS RELIED ON FOR ALLOWANCE OF WRIT:

Petitioners have cited no case where the facts are similar to the case at bar. They have called our attention to no decisions applicable to the facts presented in the case at bar nor have they shown wherein the decision in the Court below is in conflict with any decision of this Court or of any decision of any other Circuit Court of Appeals where similar facts are involved.

We have examined the cases cited by petitioner, but do not find that any of them present facts similar to the facts presented in the case at bar. In the case at bar petitioners filed their claims asking for payment of the balance due them under their respective contracts with the bankrupt. They did not ask to reclaim their property, nor did they object to the proceedings under Chapter 10 of the Chandler Act (R. 4, 7). The proceedings under Chapter 10 of the Chandler Act were for the benefit of the secured creditors as well as the unsecured creditors. The secured creditors hoped by the proceedings to get their money rather than run the risk of a loss by repossessing their property. They took a chance on the reorganization proceedings, and after the proceedings failed they, for the first time, came into Court and objected to paying their share of expenses which the Court incurred for their benefit as well as for the benefit of the unsecured creditors. In filing their claims they stated that they did not thereby waive their security in their property. They did, however, leave their property in the custody of the Court, apparently hoping that the Court would find a way to pay their claims in full. They made no objection to the appointment of the reorganization trustee nor to the order authorizing him to conduct the business of the bankrupt to keep the business operating as a going concern. It is a matter of common knowledge that such

operation involves the expenditure of money. The Court in good faith authorized the trustee to borrow money to operate the business and the trustee did this for a period of about four months, (R. 124-16). Had it not been for the losses sustained by the reorganization trustee, and the administrative expenses incurred in those proceedings, the Referee could have sold sufficient unencumbered property to pay the general administrative expenses in the bankruptcy proceedings. (R. 107).

ARGUMENT

I.

In Remington on Bankruptcy, paragraph 2583, the general rule is stated that the Bankruptcy Court will not order a sale free from liens unless there is reasonable prospect that a surplus will be left for general creditors; however, in that same paragraph the following statement is made:

> "When lien holders do not object, and expressly or impliedly consent to the expenditure of money by the Trustee in Bankruptcy, for the maintenance of the mortgaged property, an exception to the general rule prevails, and the expenses thus incurred must be paid by the lien holders out of the fund, even though the property does not sell for enough to pay the liens." Citing Robinson vs. Dickey, 36 Fed. (2d) 147.

The case which perhaps is most in point and parallels our own to a greater extent than any other is that of Virginia Securities Corporation vs. Patrick Orchards, 20 Fed. (2d) 78. In this case a large apple orchard was composed of several parcels of land and owned by one corporation. Among the liabilities was an indebtedness of $110,000 secured by a first deed of trust on four of the orchards. There were vendor's lien notes outstanding on the other two orchards aggregating approximately $13,500.00 and there was a later deed of trust covering all six orchards, securing the Appellant Jennings in the sum of approximately $23,600. There were also creditors holding bonds of the company in a large amount and general creditors holding claims of approximately $15,000. The appraisers estimated the value of the real estate at approximately $500,000 and the personal estate at approximately $4,000. The property was immediately put up for sale in September and the best bid obtainable was $132,000. The unsecured creditors objected to this amount

as being insufficient. Because it was late in the autumn it was thought wise to hold the sale over until the spring of the year and to protect and preserve the trees in the meantime. This required the expenditure of considerable money and the Court authorized the trustees to borrow sufficient funds to do this. On April 6, of the following year, it was again offered for sale, and brought approximately $162,000. This sale was confirmed by order of the Court. It was then that the Appellant Jennings discovered that after prior lien holders were paid he would receive little or nothing after the administration costs and expenses were deducted. The Court found that in each instance in which expense was incurred the reasons for the same were fully set out in the trustee's petition, were properly submitted to and acquiesced in by the creditors. The Court said:

> "The several steps thereafter taken to this end, as well as the expenditure of money in the upkeep and preservation of the properties pending sale, were matters as to which all had full knowledge, and as to which none protested until the second sale of the property, and the allocation of the purchase price to the several liens according to their priorities developed the fact that Appellant Jennings, as holder of the second mortgage note, would receive nothing on account of his debt. We think not only that this protest came too late, but in the circumstances, it is wholly without merit. The general rule with regard to the expenses of foreclosure and administration in bankruptcy is to pay such expenses out of the general estate, if there is one, rather than out of the fund derived from the sale of mortgage or lien property; but where there is no general fund, as was the case here, or where the expense has been incurred wholly for the benefit and the advantage of the mortgaged property, as also is the case here, such expenditure is properly chargeable against it, and particularly is this true where the mortgage or lien creditor volun-

> tarily chooses to avail himself of the administrative functions of the Court in bankruptcy to realize on his security. * * *
>
> "Here, as has already been said, practically the whole estate in process of administration was real estate, on all of which there were different classes of liens, but as to which there was a reasonable expectation that the proceeds of sale would pay the same in full and leave a substantial equity. To determine this question it was necessary that the property should be sold and pending its sale that it should be preserved. To accomplish this the lienholders had the benefit of the services of the trustee and of the appellant. Proper orders looking to the sale of the property had to be drawn and presented, and the property in the meantime had to be maintained in a high state of cultivation, in order to preserve it from serious deterioration and loss. All of these things were for the benefit primarily of the lienholders, who had sought and invoked the aid of the Court in the collection of their debts. By coming into bankruptcy, they lost none of their rights; but when a lien creditor avails himself of the instrumentalities of the Court in the enforcement of the lien, then the proceeds of the property upon which the lien exists may be charged with the expenses necessary in the enforcement of the lien as well as in the preservation of the property."

In comparing the above case with the instant one, we have the fact that there was a large amount of real estate, all of which was encumbered with a very small amount of personal property, which was unencumbered. The value of this personal property was in no way sufficient to pay administration costs. The period during which the apple orchard was entrusted to the care of the trustee and in which he borrowed and spent a considerable amount of money to care for and keep the trees in a healthy condition may be likened to the period of reorganization under Chapter X in the instant case where the Trustee

borrowed money, not only to protect the property, but to put it on a paying basis. We have the same acquiescence on the part of our Appellants to these proceedings as occurred in the above case until they discovered as did the Appellants above that they would have to share their burden of the expenses of administration during this period and that there would be little or nothing left for them.

In the orchard case the property was appraised at approximately $500,000 and was sold for $162,000—about one-third of its appraised value. In the instant case the property was appraised at approximately $66,000 (R. 72) and the best price obtainable was $26,800, less than one-half of its appraised value.

In Adair vs. Bank of America, 303 U. S. 350, 58 S. Ct. 594, the facts are similar to the apple orchard case quoted above. A vineyard is involved and the mortgagee attempted to escape payments of his share for harvesting the crop, preserving the vineyard and cultivating the crop of the following year. The Court said:

> "In order to operate and protect the property during the stay, and pending confirmation or other disposition of the composition or extension proposal, the statute provides * * * for the exercise by the Court of 'such control over the property of the farmer as the Court deems in the best interests of the farmer and his creditors.' These provisions look toward the maintenance of the farm as a going concern, and afford clear authority, in a proper case, for the continuance of the operations of the farm after the filing of a petition under Section 75 of the Bankruptcy Act." * * *
>
> "The Court below ruled that under the crop mortgage the farmer had the obligation to cultivate and harvest the crop at his own expense, and therefore the gross proceeds belonged to respondent. This conclusion disregards the fact that the debtor did not harvest the grapes as an ordinary mortgagor. He had

come into Court seeking relief under Section 75 of the Bankruptcy Act. The filing of his petition put the property in the control of the Court and the harvesting of the crop and the preservation of the property became a matter for the concern and action of the Court.

"Respondent certainly cannot complain of the devotion of the proceeds of the 1934 crop to the cost of harvesting that crop. The care and harvesting of that crop represented the only way to preserve its worth and the cost of protecting a fund in Court is everywhere recognized as a dominant charge on that fund. * * * The rule applies even in ordinary bankruptcy proceedings since the secured creditor benefits from the disbursement."

II.

In view of the above quoted authorities it seems unnecessary to comment further upon petitioner's brief. The trustee does not deny the validity of petitioner's liens but the trustee takes the position that his claim for payment of the pro-rata share of administrative expenses constitutes a prior claim over that of petitioner's. The effort made by the reorganization trustee under Chapter 10 of the Chandler Act was an attempt to preserve the value of all the property under the custody of the Court and the payment therefore constitutes a dominant charge against that property. Adair vs. Bank of America, supra.

The trustee concedes the general rule to be that the Bankruptcy Court will not sell encumbered property unless a showing is made that sufficient money will be obtained to pay off the encumbrance but, as we have shown, a different rule obtains where the lien claimant has impliedly invoked the assistance of the Court to realize upon his claim. The fact that all of the encumbered property was appraised separately, piece by piece, will enable the trustee to apportion the proceeds of the sale to the various lien claimants (R. 72, 73, 74). See Remington on Bankruptcy, paragraph 2602-2604.

CONCLUSION

We, therefore, maintain:

1. That there is no conflict in the Federal decisions pertaining to the subject matter presented in this case.

2. That the decisions of the Courts below are well founded upon the general principal that property placed in the charge of a Court is properly chargeable with the maintenance and preservation thereof.

3. If the petitioners are right, then no trustee could feel protected by incurring expense under Court order for the preservation of property over which the Court has jurisdiction.

We respectfully submit that the petition be denied.

Dated this 15th day of April, A.D. 1941.

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